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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

75-851

LEON VINCENT, Superintendent Greenhaven Correctional Facility,

Petitioner,

against

LEON WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1975

LEON VINCENT, Superintendent Greenhaven Correctional Facility,

Petitioner,

against

LEON WASHINGTON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Leon Vincent, Superintendent of Greenhaven Correctional Facility, Stormville, New York, prays that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *United States ex rel. Leon Washington* v. *Leon Vincent, Superintendent, Greenhaven Correctional Facility,* which granted respondent a writ of habeas corpus.

Opinions Below

The decision of the Court of Appeals which petitioner seeks to review is not yet reported and was dated November 5, 1975. The opinion of the Court of Appeals is reproduced as Appendix A. The decision of the District Court, which was reversed by the Court of Appeals, is not reported and was dated April 10, 1975. The opinion of the District Court is reproduced as Appendix B.

Jurisdiction

The jurisdiction at this Court rests on 28 U.S.C. § 1254(1). The decision of the Court of Appeals was handed down November 5, 1975.

Question Presented

Does a prosecutor's failure to correct the perjurious testimony of a prosecution witness that he received no consideration in exchange for his testimony violate Due Process of Law, where (1) both the defendant and his counsel had advance knowledge of the alleged bargain; (2) the defendant on taking the stand failed to disclose the existence of the alleged bargain and defense counsel made no attempt to elicit it from him, and (3) the defendant on taking the stand perjuriously denied knowledge of any reason that might cause the witness to accuse him falsely?

Statement of the Case

A. State Court Proceedings

On February 4, 1966, Max Regenstrich, manager of a liquor store in Brooklyn, New York, was shot dead during a holdup.

Respondent Leon Washington was arrested and indicted for the crime of murder in the first degree. Respondent was convicted, following a jury trial in Kings County, Supreme Court (McDonald, J.) of murder in the first degree. The conviction was affirmed on direct appeal by the Appellate Division 32 App. Div. 2d 613 (1969) and by the New York State Court of Appeals, 27 N Y 2d 649, 261 NE 2d 905, 313 N.Y.S. 2d 869 (1970).

Washington then sought to attack his conviction collaterally by way of a writ of error *coram nobis* in Kings

County Supreme Court. In a statement sworn to September 9, 1970, in support of his *coram nobis* application, Washington claimed that a prosecution witness, one Martin Anderson, had testified against him because an assistant district attorney had promised Anderson he would see what he could do to help him on an outstanding weapons charge. Respondent claimed that this alleged promise of assistance by the prosecution was improperly suppressed when the prosecutor failed to correct Anderson's denials, while testifying at trial, that there was any such bargain. Respondent also alleged in his sworn *coram nobis* statement that Anderson told him of this alleged bargain *before* the trial, and that he (respondent) never told his trial counsel of Anderson's statement. This assertion was contradicted by Washington's trial counsel, however, who conceded that he had been informed by his client of this conversation prior to trial.

During the trial, Martin Anderson testified for the State. On several occasions during cross-examination, Anderson denied that any bargain had been made with the prosecutor in exchange for his testimony. The prosecutor said or did nothing in response to these denials.

Washington took the stand at the trial in his own behalf. Washington denied on the stand that he knew of any reason why Anderson would falsely accuse him of murder in the following colloquy with the trial court:

> "The Court: Any reason you could think of why he should try to accuse you of murder?
>
> "The Witness: Well, I know he's not loved me.
>
> The Court: I didn't ask you that. Is there any reason why he would falsely accuse you of murder?
>
> The Witness: He could be trying to protect someone. I don't know.
>
> The Court: But why you?
>
> The Witness: I don't know.
>
> The Court: All right."

This testimony by Washington was in direct conflict with his own sworn *coram nobis* statement that he was told prior to the trial of the bargain struck between Anderson and the prosecutor.

A hearing was held on the *coram nobis* application before the same trial judge who presided at Washington's trial. Certain trial testimony was introduced into the record, and the trial prosecutor testified for the People. Washington's trial counsel also stated he had been advised of the alleged bargain prior to trial.

The trial court found that a promise of sorts had been made by the prosecutor and that the prosecutor had failed to correct Anderson's denials at trial of a bargain. Accordingly, following the dictates of *People* v. *Savvides,* 1 N Y 2d 554, 136 NE 2d 853, 154 N.Y.S. 2d 885 (1956), the court vacated the judgment. However, in granting the writ of error *coram nobis,* the court stated that it was convinced that any error was harmless because in its opinion the evidence at trial sans Anderson's testimony was sufficient to prove Washington's guilt beyond a reasonable doubt. The court declined to apply the harmless error rule, however, because it considered that only an appellate court could hold this kind of error harmless in the circumstances of this case.

On appeal, the Appellate Division reversed by a vote of three to two, 38 App. Div. 2d 189, 328 N.Y.S. 2d 317, modified, 39 App. Div. 2d 726, 331 N.Y.S. 2d 880 (1972). The majority found that the *Savvides* rule did not apply because both Washington and his counsel knew Anderson's testimony to be false and yet deliberately and perjuriously refrained from disclosing that fact. Accordingly no fraud was perpetrated on the defendant. The majority also found that proof of the defendant's guilt was undisputed and played little part, if any, in his conviction. The court ruled accordingly that the prosecutor's error was harmless beyond a reasonable doubt. The dissenting

justices, though not convinced that Washington or his counsel actually had knowledge of the Anderson bargain, also believed the error was harmless beyond a reasonable doubt in view of the overwhelming proof of guilt, but preferred to let the State Court of Appeals put any limiting instruction on *Savvides*.*

The New York State Court of Appeals affirmed by a vote of six to one, 32 N Y 2d 401, 298 N.E. 2d 665, 345 N.Y.S. 2d 520 (1973). The majority followed the opinion of the majority in the Appellate Division, although it did not reach the harmless error question. The dissent thought *Savvides* was a *per se* rule to which no exception could be allowed.**

B. Federal Court Proceedings

Washington then petitioned for a writ of federal habeas corpus in the United States District Court for the Eastern District of New York. The District Court in denying the writ on April 10, 1975, adopted the analysis of the majorities in the state appellate courts. In addition, the court took note of the trial court's observation that in his view the evidence was sufficient to convict Washington without Anderson's testimony.

On November 5, 1975, the United States Court of Appeals for the Second Circuit reversed the judgment of the District Court and granted Washington a writ of habeas corpus unless he was afforded a new trial. The court ruled that the knowing use by a state prosecutor of perjured testimony "ordinarily" results in a deprivation of due process (21). The court found that the false testimony could reasonably have influenced the jury to convict

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* The Appellate Division opinions are reproduced as Appendix C.

** The State Court of Appeals opinion is reproduced as Appendix D.

Washington. As for the effect of prior knowledge by Washington and his counsel of the alleged bargain and their failure to act upon that knowledge, the court stated it would be "inappropriate" not to permit Washington to challenge the prosecutorial misconduct for these reasons (23). The court thought that the problem was not so much an unawareness that Anderson's testimony may have been perjured as by an inability to respond effetcively in view of the prosecutor's silence (23). Nonetheless the court noted that the performance of Washington and his counsel were not "a model to be emulated" (12-13) and that it was not convinced that Washington's counsel had no alternatives other than a continued futile cross-examination of Anderson (23). The court stated that a contrary result might be indicated were the harm "less pronounced" or where "promising opportunities" to resolve the issue of prosecutorial misconduct were "clearly available" (23).

Reasons Why Certiorari Should Be Granted

This Court should determine whether a prosecutor's failure to correct the perjurious testimony of a prosecution witness that he received no consideration for his testimony violates Due Process of Law, where (1) both the defendant and his counsel had advance knowledge of the alleged bargain (2) the defendant on taking the stand failed to disclose the possible existence of the alleged bargain and defense counsel made no attempt to elicit it from him, and (3) the defendant on taking the stand perjuriously denied knowledge of any reason that might cause the witness to accuse him falsely.

The decision of the United States Court of Appeals for the Second Circuit is completely contrary to the approach taken by other Circuit Courts of Appeals in similar cases where a defendant or his counsel has advance knowledge of allegedly "suppressed" evidence, perjurious testimony, or other evidence but fails to act on that knowledge, take

corrective action, or challenge the allegedly perjurious testimony. Other Circuits have adopted the basic and fundamentally sound principle that in such situations the defense may not subsequently assert belated claims of suppressed or new evidence or perjured testimony in order to obtain judicial relief. The rationale of this rule is found in elementary considerations of waiver, estoppel, and the efficient orderly administration of criminal justice.

The leading case in conflict with the case at bar is *Green* v. *United States,* 256 F. 2d 483 (1st Cir.), cert. denied 358 U.S. 854 (1958). In *Green,* the defendant sought collateral relief on a claim that the prosecution suppressed a conversation between a co-defendant and a United States attorney. Green, however, had been aware of the conversation prior to trial. The court ruled:

> "It is clear that this asserted information, of which Green was admittedly aware before he went on trial, cannot now be used as a basis for attacking the judgment of conviction collaterally in a proceeding under U.S.C. § 2255 . . . Green cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding under 28 U.S.C. § 2255." *Green, supra,* 256 F 2d at 484.

The *Green* principle has been followed by numerous Circuits in a variety of contexts. In *Evans* v. *United States,* 408 F 2d 369 (7th Cir. 1969) a prosecution witness, after testifying but before the end of the trial, allegedly told the defendant, his attorney, and a government attorney that he had lied at the trial because "the whole case was a lie". The court ruled:

> ". . . the fact that the alleged statement was known to petitioner and his counsel during the trial compelled petitioner to raise this issue then or not at all. When

> a criminal defendant, during his trial, has reason to believe that perjured testimony was employed by the prosecution, he must impeach the testimony at the trial . . ."

The court then went on to quote the passage from *Green, supra,* p. 251. Similarly, in *Decker* v. *United States,* 378 F 2d 245, 251 (6th Cir. 1967), the Sixth Circuit cited *Green* in ruling that deliberate toleration of commission of perjury cannot be later employed to gain judicial relief by one who connived in the use of the perjury. In *Saville* v. *United States,* 451 F. 2d 649 (1st Cir. 1971), the First Circuit had occasion to reaffirm its decision in *Green* in a case where the accused sought to collaterally attack his conviction with information he had withheld at trial.

In this case, the court distinguished *Green* on the grounds that "Washington had not overheard the actual conversation between Levine (the prosecutor) and Anderson, and thus could not *know* that Anderson was engaging in anything more than 'jailhouse talk'" (23). This of course was a distinction without material significance, going only to the question of the source of the defense's advance knowledge and not to the question of knowledge itself. That advance knowledge of information may come directly or indirectly does not materially alter defense counsel's obligation to act upon that knowledge once it is acquired.

It is thus clear that the state appellate courts in this case were simply following a basic doctrine of law as expounded in numerous federal Circuits. See also *Hampton* v. *United States,* 504 F 2d 600 (10th Cir. 1974); *United States* v. *Purin,* 486 F 2d 1363, 1368, n. 2 (2d Cir. 1973), cert. denied 417 U.S. 930 (1974); *Wallace* v. *Hocker,* 441 F 2d 219 (9th Cir. 1971); *Sanassarion* v. *State of California,* 439 F 2d 703 (9th Cir.), cert. denied 404 U.S. 881 (1971); *Taylor* v. *United States,* 229 F 2d 826, 833 (8th Cir.), cert. denied 351 U.S. 986 (1956); *Davis* v. *United States,* 316 F Supp. 913, 915 (E.D. Tenn. 1970).

This court's seminal decision on the effect of a prosecutor's failure to correct known perjurious testimony, *Napue* v. *Illinois*, 360 U.S. 264 (1959), does not resolve the issue raised in the instant case. In *Napue*, the accused had no prior knowledge of the State Attorney's bargain with the prosecution witness, and important evidence was thus suppressed. This case, however, is not a suppression case at all. The basic purpose of *Brady* v. *Maryland*, 373 U.S. 83 (1963) and kindred cases is simply to forbid suppression of evidence known to the government but *unknown* to the defense. Where the defense has advance knowledge of evidence, however, there is no true suppression.

In this case, the defendant and his lawyer had advance knowledge of the bargain between the prosecutor and his witness. At the very least, Washington and his counsel were put on notice that such a bargain existed. Yet neither took any action to correct Anderson's perjurious testimony, although the court below suggested that a side bar conference or in camera proceeding might well have been in order. The withholding of evidence by the defense did not stop here. The defense forfeited yet another opportunity to challenge Anderson's perjurious testimony when Washington took the stand in his own behalf. Defense counsel failed to elicit testimony from his client that Anderson had told him about the existence of his bargain with the prosecutor in exchange for his testimony, and Washington otherwise failed to disclose the existence of the bargain. Nor did the withholding of evidence by the defense stop here. Compounding all these defense failures was Washington's own statement, upon inquiry by the trial judge, that he knew no reason why Anderson would accuse him falsely of murder. In view of Washington's subsequent sworn *coram nobis* statement to the contrary, this was clear perjury.*

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* The opinion of the Court of Appeals did not once mention Washington's perjury.

Notwithstanding this total failure by the defense to act upon information known to it prior to trial and notwithstanding the perjurious statement by the defendant himself that he had no such information, the court below granted the writ. Such a decision places a premium on perjury and neglect, ignores basic principles of waiver and estoppel so essential to the proper administration of the criminal law, and clashes directly with the sound approach taken by all other Circuit Courts of Appeals in similar situations. That conflict should be resolved, and accordingly this case warrants plenary consideration by this Court.

CONCLUSION

Petitioner's application for certiorari should be granted and the decision of the Court of Appeals summarily reversed or plenary review granted.

Dated: New York, New York, December 12, 1975.

Respectfully submitted,

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APPENDIX A

Decision of the United States Court of Appeals for the Second Circuit, dated November 5, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 248—September Term, 1975.

(Argued October 9, 1975 Decided November 5, 1975.)

Docket No. 75-2100

UNITED STATES OF AMERICA,
ex. rel. LEON WASHINGTON,

Petitioner-Appellant,

v.

LEON J. VINCENT, Warden,
Greenhaven State Prison,

Respondent-Appellee.

Before:

KAUFMAN, *Chief Judge,*
FRIENDLY and SMITH, *Circuit Judges.*

Appeal from an order denying a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, entered in the United States District Court for the Eastern District of New York, by Mark A. Costantino, *Judge.*

Order reversed, with instructions to grant the writ of

habeas corpus unless the State accords Washington a new trial within 60 days of the issuance of the mandate.

PATRICK M. WALL, New York, New York, *for Petitioner-Appellant.*

RALPH L. MCMURRY, Assistant Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for Respondent-Appellee.*

KAUFMAN, *Chief Judge:*

In March, 1967 Leon Washington was convicted of first degree murder. During the trial, Martin Anderson, a key prosecution witness who was under indictment for three felonies, repeatedly denied that he had been offered favorable treatment in exchange for his testimony. The prosecutor, who had indeed promised Anderson special consideration, made no effort to correct the perjurious testimony. That such reprehensible conduct is not only improper but frequently results in a violation of the constitutional right to a fair trial is established beyond dispute. *Napue* v. *Illinois,* 360 U.S. 264 (1959). The difficult question we must decide is whether Washington should not be permitted to raise such due process claims because he and his counsel had reason to suspect the falsity of the witness's answers, but failed to make their suspicions known. We must also, of course, determine whether Washington's challenge to the integrity of his trial must fail because the prosecutorial misbehavior did not affect the ultimate outcome.

We have concluded that Washington's petition must be granted. Although we do not view the performance of the

appellant and his counsel as a model to be emulated, we are of the view that, under the particular circumstances of this case, Washington may challenge the prosecutor's misconduct. We have also determined, after a careful examination of the State trial record, that the State's misbehavior substantially prejudiced the defendant. Accordingly, we reverse.

I.

To provide the necessary background for our holding, a full exposition of the facts and procedural posture of this case is required. On February 4, 1966 at approximately 10:45 p.m., 68-year old Max Regenstrich,[1] manager of the Gates Wine & Liquor Store in Brooklyn, was standing near the store's cash register. Also present in the store were Sam Silver (the owner) and Silver's wife Anna. Four individuals entered, and while one went through the motions of purchasing a bottle of wine, the other three departed. Immediately upon paying Silver for the wine, the "customer" drew a revolver from his pocket, and announced, "This is a stickup." He ordered the 73-year old Mr. Silver to stand off approximately seven feet from the cash register, while Mrs. Silver fled from the store. Regenstrich, meanwhile, lunged at the intruder with an iron pipe. The robber thereupon shot and killed Regenstrich. The gunman escaped immediately, disappearing before the police arrived.

Shortly thereafter, the Silvers were questioned at the scene by Detective Robert C. Free. Their descriptions of the killer were vague. They could not recall whether the gunman had a moustache, a beard, or was clean-shaven. Based upon their accounts, Detective Free issued a bulletin seeking a suspect 5'4" tall, weighing 125 pounds. Two weeks after the crime, the Silvers were asked to make a photographic identification of the murderer. Seated together to study the array, they jointly selected the mug shot of Leon

[1] Also referred to on occasion in the record as "Regenstreich."

Washington. The police unsuccessfully attempted to locate Washington, who then surrendered voluntarily in April, 1966. Although Washington remained in custody awaiting trial for almost a year, the Silvers were never requested to identify Washington at a line-up.

Washington's trial commenced on February 21, 1967. Mr. Silver testified that the killer was somewhat shorter than the 5'6" Silver, and "a little taller" than Regenstrich, who was 4'11" in height. In fact, Washington stood 5'9½" and weighed 160 pounds. The Silvers, nevertheless, pointed to Washington, who apparently was seated at the defense counsel table, as the murderer. Washington took the stand in his own defense and denied any involvement in the crime.[2]

II.

Except for the testimony of one Martin Anderson, a/k/a Ali Suba, the Silvers' testimony was the only evidence offered to connect Washington with the robbery and murder. Anderson, an 18-year old acquaintance of Washington, had been arrested 2½ hours after the Regenstrich murder for possession of a gun which proved to be the murder weapon.[3] At Washington's trial, Anderson testified that he had received the revolver from Washington. Anderson said

---

[2] He was unable to offer precise alibi, however, since he could not recall exactly where he had been during the period February-April, 1966. He claimed to have worked at several short-lived, unspecified jobs and to have roomed with various unidentified friends. (Washington did recall he had temporarily stayed with someone known to him only as "Goomy.")

[3] Police Officer James O. Barrentine received a report that someone was brandishing a revolver at the Beverly Inn in Brooklyn. When he arrived at the scene, he located the weapon in the pocket of one Robert Lipscome, a local storeowner known to Barrentine who explained that he had seized the gun from Anderson. Although Anderson insisted at Washington's murder trial that the gun had been jammed and he was merely showing it to a friend who might fix it for him, Barrentine testified that the loaded gun was test-fired after Anderson's arrest and found to be in working condition.

he had been driving with Washington and another friend on the night of the murder. At 10:30 p.m., Anderson testified, Washington left the car and entered the Silver's liquor store. The witness said he heard a "pop" like the firing of a cap pistol, after which Washington returned to the car carrying a bag filled with cash. Washington, Anderson testified, "just kept saying he had to do it. . . . He said he had shot the man and that, you know, the man tried to hit him with something." Anderson related that a gun had been protruding from Washington's pocket, which Anderson removed when Washington fell asleep in the car. He was merely showing it to a friend in a bar, he claimed, when he was arrested.

On cross-examination Washington's attorney, Patrick Wall, questioned Anderson extensively to determine whether his testimony was given in return for favorable treatment on the weapons charge or on his indictments for first degree burglary and first degree grand larceny stemming from a June, 1966 incident. Anderson repeatedly denied that he had been promised any quid pro quo:

> Q. Has any arrangement been made between you and the district attorney's office with respect to that [gun possession] case concerning your testimony here?
>
> A. No, sir.
>
> Q. Do you expect to be rewarded in some way for your testimony here?
>
> A. No, sir.
>
> Q. Has anyone given you an indication that by your testimony here you will be helping yourself in that case?
>
> A. No, sir.

Further cross-examination failed to shake Anderson:

> Q. Do you expect to receive any favorable treatment from the district attorney for your testimony in this trial, implicating the defendant?
>
> A. No, sir.

Q. Either on the June indictment or on the other indictment?

A. No, sir.

Q. Have you had any arrangements with anybody so that you will receive the benefit of implicating this defendant?

A. No, sir.

The Court: All right. That's neither nothing was said before you made the statement that you talked about, when you talked to the district attorney and he asked you about a stenographer there, was anything said before that, or was anything said after, at either time?

The Witness: No, sir.

Q. [By Mr. Wall, defense counsel:] At any time, sir, since February 4th of 1966, has anyone offered you anything in return for your favorable testimony to implicate him?

A. No, sir.

Mr. Levine [Assistant District Attorney:] Objection.

The Court: Overruled.

Mr. Wall: I have no further questions, your Honor.

The Assistant District Attorney, Arthur Levine, remained silent during these exchanges, except for the single objection noted. Nor did Washington, when he took the stand, indicate that he had any reason to suspect that Anderson was lying about not having received consideration in return for his testimony:

The Court: Any reason you could think of why [Anderson] should try to accuse you of murder?

The Witness: Well, I know he's not loved me.

The Court: What?

The Witness: He's not in love with me.

The Court: I didn't ask you that. Is there any reason why he would falsely accuse you of murder?

The Witness: He could be trying to protect someone. I don't know.

The Court: But why you?

The Witness: I don't know.

The Court: All right.

Neither Washington nor Wall made any further attempt to challenge Anderson's denials of receiving a promise of leniency from the prosecutor.

Jury deliberations commenced on March 2, 1967. After 14 hours of discussions, the jury announced at 4:45 p.m. on Friday afternoon, March 3, 1967 that it was deadlocked. The judge thereupon told the jurors that both sides desired to have the jury continue its deliberations and arrive at a unanimous verdict. He went on to caution them that their verdict should be the "result of thought, consideration and of reason and an analysis of the evidence and not just blind stubbornness." He also advised that "if there is a minority one way or the other [, they should] reconsider [their] positions." The jury debated for an additional five hours before finally returning with a guilty verdict. Washington was sentenced to life imprisonment and is currently incarcerated at Greenhaven State Prison.

Washington appealed his conviction to the Appellate Division, 32 App.Div. 2d 613, 300 N.Y.S.2d 525 (1969), and to the New York Court of Appeals, 27 N.Y. 2d 649, 261 N.E.2d 905, 313 N.Y.S.2d 869 (1970). Both courts affirmed without opinion.

III.

Although not mentioned at the trial, both Washington and Wall had reason to doubt Anderson's denials of a bargain with the prosecutor. When Washington encountered Anderson in jail, shortly before the murder trial, Anderson revealed that Levine had promised leniency on his gun possession indictment in consideration for Anderson's testimony. Washington informed Wall of this con-

versation, but it was not brought to the court's (or Levine's) attention before or during the trial.[4]

Some time in 1970, following the direct appeal to the New York Court of Appeals, Wall inspected the transcript of the proceedings on Anderson's weapons possession charge. He discovered that the following exchange had occurred on April 12, 1967, only one month after Washington's trial:

> Mr. Levine: . . . I move to dismiss this indictment, and I base it upon the assistance that this defendant [Anderson] gave the People in securing [Washington's] murder one conviction.
>
> . . .
>
> The Court: Were any promises made to him that a disposition would be made?
>
> Mr. Levine: I told him several times that I would see what I could do to help him.

Wall immediately instituted a coram nobis proceeding on Washington's behalf, and a hearing was held in February, 1971 before Hon. Miles F. McDonald, the justice who had presided at Washington's trial. Although four years had elapsed since Levine had promised Anderson he would recommend favorable treatment, he continued to be evasive when questioned about his arrangement with Anderson. He repeatedly insisted that no *specific* offer had been extended. After being confronted with his dismissal statement in Anderson's case, however, he finally conceded that a promise had been made:

> Q. [By Mr. Wall:] . . . You did speak with Mr. Martin Anderson and told him, to be exact, you told him that you would try to help him in his case?
>
> A. [Mr. Levine:] That's right.

---

[4] Observing Levine's studied silence during Anderson's cross-examination, Wall claims he concluded either that Washington had lied to him or that Anderson had fabricated the story, perhaps to justify turning State's witness against his "friend".

Justice McDonald granted the writ of coram nobis, but did so reluctantly:

> I can say now that testimony of this trial sans the testimony of Anderson was in my opinion sufficient to convince the jury of the guilt of this defendant beyond a reasonable doubt, and I was convinced of his guilt beyond a reasonable doubt. . . .
> . . . Personally, I would be inclined to hold in all of these circumstances in this case, this evidence . . . is not sufficient to warrant a reversal of the verdict granted in a writ of coram nobis in this case because the error was a harmless error in that respect, and I'm prevented from doing that.

Justice McDonald interpreted *People* v. *Savvides,* 1 N.Y.2d 554, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956), as precluding reliance on the "harmless error" doctrine in cases where a prosecutor made no attempt to correct testimony he knew to be false.

IV.

The Appellate Division, by a vote of three to two, reversed the granting of coram nobis, 38 App.Div.2d 189, 328 N.Y.S.2d 317, *modified,* 39 App.Div.2d 726, 331 N.Y.S.2d 880 (1972). Although the majority agreed that Levine had been guilty of "gross impropriety in withholding the disclosure of the promise made to Anderson . . .," it held that the error was harmless:

> . . . Anderson's testimony played little, if any, part in the defendant's conviction, for the jury was made fully aware of his prior criminal record, of the pending gun charge and of the fact that he had consumed a large quantity of alcohol on the day of the murder.

38 App.Div. 2d at 194-95, 328 N.Y.S. 2d at 322. The majority added that Washington had "commit[ted] perjury" in denying that he knew of any specific reason why Ander-

son would accuse him of murder, 38 App.Div. 2d at 193, 328 N.Y.S. 2d 321, and concluded that

> [T]he ends of justice are poorly served when a conviction is set aside in a case where the defendant's guilt is clear beyond any reasonable doubt and where the defendant has not been misled or deceived by the perjured testimony and had it in his power to indicate its falsity.

38 App.Div. 2d at 194, 328 N.Y.S. 2d at 322. The two dissenters disagreed with the characterization of Washington's responses as "perjury" and felt that *Savvides* prevented them from denying the writ of coram nobis on the basis of harmless error.

The Court of Appeals affirmed the majority holding of the Appellate Division, 32 N.Y.2d 401, 298 N.E. 2d 665, 345 N.Y.S. 2d 520 (1973), despite its view that Martin Anderson was "an important prosecution witness" who had received "at least soft promises, and probably more. . . ." 32 N.Y.2d at 402, 298 N.E.2d at 665, 345 N.Y.S. 2d at 521. The Court conceded that Levine's failure to correct the perjury by Anderson normally would warrant reversal of the conviction, but felt that "a very limited exception to the *Savvides* rule" was necessary "[w]here . . . both the defendant and his counsel, with knowledge of the facts, stood silently by and did nothing themselves to remedy the situation. . . ." 32 N.Y. 2d at 403, 298 N.E.2d at 666, 345 N.Y.S. 2d at 522. The majority apparently agreed with the courts below that any error had been harmless, although it did not directly address this question.

In his dissenting opinion, Chief Judge Fuld recalled the language in *Savvides,* 1 N.Y. 2d at 556-57, 136 N.E. 2d at 854, 154 N.Y.S. 2d at 887, that "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach." He insisted that the "defense counsel and his client were assuredly entitled to rest upon the certainty that, if the witness was testifying

falsely on so vital a matter, the prosecutor himself would speak out and set the record straight. . . . What we declared in *Savvides* should not, in this case, be watered down one drop or changed one tittle." 32 N.Y. 2d at 404-05, 298 N.E. 2d at 666-67, 345 N.Y.S. 2d at 522-23.

Having exhausted available state remedies, Washington petitioned for a writ of habeas corpus in the federal district court, pursuant to 28 U.S.C. § 2254. Judge Costantino denied the petition, finding no "constitutional error sufficient to require the issuance of a writ of habeas corpus." The district judge "[b]uttress[ed] this conclusion [with] the comment of Justice McDonald, who was both the trial judge and the coram nobis judge, that he was convinced that the evidence at the trial was sufficient to convict the relator, even without the testimony of [Anderson]."[5]

V.

We have come to the conclusion that the district judge's decision must be reversed. The knowing use by a state prosecutor of perjured testimony ordinarily results in a deprivation of fundamental due process, violating the 14th Amendment and requiring a new trial. *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (per curiam); *Napue* v. *Illinois*, 360 U.S. 264, 269, 271-72 (1959); *Giglio* v. *United States*, 405 U.S. 150, 153 (1972). Whether the State solicits the false testimony or merely allows it to stand uncorrected when it appears does not diminish the viability of this principle, *Napue, supra*, at 269; *Giglio, supra*, at 153; nor does the rule lose force because the perjury reflects only upon the credibility of the witness. *Napue, supra*, at 269. A conviction obtained through the use of testimony known by the State to be untrue must fall if

> the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .

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[5] Judge Costantino denied the appellant's request for a certificate of probable cause. A panel of this Court granted such a certificate on May 21, 1975.

> [or if] the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial.

Napue, supra, at 271, 272; *Giglio, supra,* at 154.

Although Justice McDonald and others who have passed upon Washington's petitions have decided that the State's misbehavior in this case did not affect the outcome of the trial, it is clear that we are required to make our own independent examination of the record. *Townsend* v. *Sain,* 372 U.S. 293, 316 (1963); *Napue, supra,* at 271.* Our study of the trial transcript makes plain we cannot conclude that Anderson's testimony could not have influenced the jury to convict Washington. Our reasons may be set forth *en bloc.* We have already noted that the jury had considerable difficulty in reaching its verdict. The Silvers' testimony, moreover, was far from overwhelming. Mrs. Silver had a mere glimpse of the gunman as she fled from the store, and Mr. Silver described the killer in terms that did not match Washington's height, weight, or appearance. Neither of the Silvers was able to recall, either immediately after the incident or at trial, whether the perpetrator had such obvious distinguishing marks as a moustache or a beard.

Anderson, by contrast, delivered the *coup de grâce,* unequivocally placing Washington at the scene of the crime with the murder weapon in his pocket, the robbery proceeds in his hands, and a confession in his mouth. Clearly, it is reasonable to conclude that Anderson's testimony tipped the balance for this otherwise deadlocked jury. *See*

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* In light of this well-established rule, it is surprising that neither party thought it appropriate to file a copy of the trial transcript. Repeated requests to the parties made through the Clerk's Office finally produced a copy of the trial minutes.

United States v. *Lusterino*, 450 F.2d 572, 575 (2d Cir. 1971).[7]

There remains, therefore, the very real possibility that Washington may have been innocent or, at least, that the jury might not have been convinced of Washington's guilt beyond a reasonable doubt if the promise to Anderson had been made known. For this reason, we believe that in this case it would be inappropriate not to permit Washington to challenge the egregious and highly damaging prosecutorial misconduct solely because he and his lawyer may have failed to utilize all available means for exploring the prosecutor's highhandedness at the trial.[8] A contrary decision might be indicated in a case where the possible harm was less pronounced, particularly where promising opportunities to resolve the issue of prosecutorial misconduct at trial were clearly available.[9]

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[7] That the jurors had been apprised of other grounds for disbelieving Anderson's testimony could not turn "what was otherwise a tainted trial into a fair one." *Napue, supra,* at 270; *Lusterino, supra,* at 575.

[8] Although it is urged that further cross-examination of Anderson was unlikely to be productive, and that placing the prosecutor on the stand might have risked the resentment of the jury and disaster for Washington, we are not convinced that Washington's counsel had no other alternatives. He could, for example, have requested a side-bar conference or an *in camera* proceeding at which he could put the matter of Levine's promises directly to the prosecutor. We cannot, therefore, adopt Chief Judge Fuld's *per se* reversal approach, 32 N.Y. 2d at 404-05, 298 N.E. 2d at 666-67, 345 N.Y.S. 2d at 523, for all cases.

[9] We need not tarry over the various cases cited by the State, *e.g.*, *United States* v. *Soblen*, 301 F.2d 236, 242 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962); *Wallace* v. *Hocker*, 441 F.2d 219, 220 (9th Cir. 1971), which stand for the principle that relief must be denied where the defendant or his counsel knew before trial of exculpatory material they later claimed was suppressed by the prosecution. The harm in the present case was caused not so much by unawareness that Anderson's testimony may have been perjured as by inability to respond effectively in view of Levine's silence. Moreover, unlike the facts in *Green* v. *United States*, 256 F.2d 483 (1st Cir.), *cert. denied*, 358 U.S. 854 (1958), Washington had not overheard the actual conversation between Levine and Anderson, and thus could not *know* that Anderson was engaging in anything more than "jailhouse talk."

Accordingly, we reverse with instructions to grant the writ of habeas corpus unless the State accords Washington a new trial within 60 days of the issuance of the mandate herein.[10]

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[10] The court trying the case may extend the period for a total not to exceed 180 days from the date on which the order occasioning the retrial becomes final, where unavailability of witnesses or other factors resulting from passage of time shall make trial within 60 days impractical.

APPENDIX B

Decision of the United States District Court for the Eastern District of New York, dated April 10, 1975.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74-C-1722

MEMORANDUM AND ORDER

UNITED STATES OF AMERICA ex rel. LEON WASHINGTON,

Petitioner,

v.

LEON V. VINCENT, Warden, GREENHAVEN STATE PRISON,

Respondent.

APPEARANCES:

PATRICK M. WALL, 36 West 44th Street, New York City 10036, for relator

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Two World Trade Center, New York City 10047, Burton Herman, Ass't Attorney General, of counsel, for respondent

COSTANTINO, D.J.

This is a petition for a writ of habeas corpus based upon an allegation that the relator was denied his due process right to a fair trial when the prosecutor at his trial allowed an important witness to perjure himself about whether he had received consideration for testifying for

the prosecution. On March 3, 1967 the relator was found guilty by a jury of murder in the first degree in Supreme Court, Kings County. On April 14, 1969 the Appellate Division, Second Department, affirmed the judgment, *People* v. *Washington*, 32 A.D. 2d 613, 300 N.Y.S.2d 525, and the Court of Appeals affirmed, 27 N.Y.2d 649, 313 N.Y.S.2d 869 (1970). The relator next moved for an order vacating the judgment of conviction, and after a hearing, the motion was granted by Honorable Myles F. McDonald in Supreme Court, Kings County on March 23, 1971. The Appellate Division, Second Department reversed that decision, 38 A.D.2d 189, 328 N.Y.S.2d 317 (1972), Justices Munder and Brennan dissenting, and the Court of Appeals affirmed on May 31, 1973, 32 N.Y.2d 401, 345 N.Y.S.2d 520 (1973), Chief Judge Fuld dissenting. Relator has exhausted state remedies as is required by 28 U.S.C. § 2254.

The issue presented has been fully and adequately argued in the various opinions that this case has engendered. Essentially the question is whether the failure of the prosecutor to correct conceded perjury deprived the relator of a fair trial when both the relator and his counsel knew of the perjury. It is clear beyond any doubt that the actions of the prosecutor were wrong; he had personal knowledge that the witness had been offered assurances and yet he did nothing to correct the impression given by the witness. Were that the end of this case the court would issue the writ, for a conviction based upon perjudious testimony when the perjury is within the knowledge of the prosecutor should be voided. *People* v. *Savvides*, 1 N.Y.2d 553, 154 N.Y.S. 885 (1956); *Napue* v. *Illinois*, 360 U.S. 264 (1959). However, as both the Appellate Division opinion of Justice Shapiro and the Court of Appeals opinion of Judge Jones noted, the general rule should be modified where the defendant and his counsel knew of the impropriety and had an opportunity to correct the misinformation. Counsel contends that the responses of the witness to his questions about assurances led him to conclude that

the information supplied by the defendant was incorrect. If counsel believed the matter that crucial, as he now asserts it was, he could have requested the prosecutor to clarify the matter.

The rule of *Savvides, supra,* and *Napue, supra* should not be abandoned, but this case does not present a constitutional error sufficient to require the issuance of a writ of habeas corpus. *United States* v. *Ruggiero,* 472 U.S. 599 (2d Cir. 1973), *cert. denied,* 412 U.S. 939 (1973). Buttressing this conclusion is the comment of Justice McDonald, who was both the trial judge and the coram nobis judge, that he was convinced that the evidence at the trial was sufficient to convict the relator, even without the testimony of the particular witness with which we are concerned. Accordingly the petition is denied.

So ordered.

(Illegible Signature)
U. S. D. J.

APPENDIX C

Decisions of the Supreme Court of the State of New York, Appellate Division, Second Department, dated January 24, 1972, and May 8, 1972.

OPINIONS OF THE APPELLATE DIVISION, SECOND DEPARTMENT

Opinion of January 24, 1972

SHAPIRO, J. In this case the Criminal Term, after a hearing, sustained the defendant's application for a writ of error *coram nobis* and set aside the judgment convicting him of the crime of murder in the first degree. On direct appeal the judgment had been affirmed by this court and by the Court of Appeals (*People* v. *Washington*, 32 A D 2d 613, affd. 27 N Y 2d 649).

The basis for the court's determination setting aside the judgment of conviction was that a witness, Martin Anderson, perjured himself on the trial when he denied that the prosecutor had made him any promise in connection with his indictment for the possession of the gun used in the instant killing. Upon cross-examination at the trial he testified as follows:

"Q. Has any arrangement been made between you and the district attorney's office with respect to that case concerning your testimony here? A. No, sir.

Q. Do you expect to be rewarded in some way for your testimony here? A. No, sir.

Q. Has anyone given you an indication that by your testimony here you will be helping yourself in that case? A. No, sir.

* * * * * *

The Court: * * * Did you make any deals with the district attorney that if you testified against this man you would get off on the other case?

The Witness: No, sir.

By Mr. Wall [attorney for defendant]:

Q. Or you would receive some sort of favorable consideration on the other case? A. No, sir.

Q. Do you expect to receive any favorable treatment from the district attorney for your testimony in this trial, implicating this defendant? A. No, sir.

Q. Either on the June indictment or the other indictment? A. No, sir.

Q. Have you had any arrangements with anybody so that you will receive the benefit of implicating this defendant? A. No, sir.

The Court: All right. That's neither nothing was said before you made the statement that you talked about, when you talked to the district attorney and he asked you about a stenographer there, was anything said before that, or was anything said after, at either time?

The Witness: No, sir.

By Mr. Wall:

Q. At any time, sir, since February 4th of 1966, has anyone offered you anything in return for your favorable testimony to implicate him? A. No, sir."

After the defendant was convicted the People moved to dismiss the indictment charging Anderson with possession of the gun on the basis of his assistance in testifying in this defendant's case. In moving to dismiss that indictment the Assistant District Attorney (who was also the same one who had prosecuted this defendant) told the court that while no "direct" or "specific" promise had been made to Anderson he did tell him he would do what he could to help him in return for his testimony. His "dismissal statement", which was filed in connection with the

dismissal of the Anderson indictment, in pertinent part reads:

> "Prior to the time the instant defendant testified during the several conferences I had with him, I told him that I would try and help him in the instant case."

I agree with the statement of the District Attorney, in his brief, that "there is little in the way of praise which can be said for the Assistant District Attorney who vigorously prosecuted the defendant, but sat passively by and did not correct the erroneous testimony the witness proffered." Therefore, if the record contained nothing else it is clear that the prosecutor's conduct would necessarily require a vacatur of the judgment of conviction (*People* v. *Savvides,* 1 N Y 2d 554; *People* v. *Mangi,* 10 N Y 2d 86; *People* v. *Ellington,* 19 A D 2d 654).

The commendable rationale of those and like cases is that the People may not secure—and hold—a conviction which has been obtained by testimony which they knew, *and the defendant did not know,* to be perjured. The record in this case, however, makes it clear beyond peradventure that when Anderson gave his "no pre-arrangement" testimony both the defendant *and his counsel* knew it to be false and deliberately refrained from disclosing that fact. In his moving papers on this *coram nobis* application the defendant stated that shortly before his trial commenced he had a conversation with the witness, Martin Anderson, who had been indicted for possession of the murder weapon, and that Anderson told him that the District Attorney had promised him, Anderson, that "he would see what he could do to help him on the gun case under indictment #1821/66, if he would testify against" the defendant. Although the defendant says he was ignorant of the import of that statement by Anderson and therefore never informed his trial counsel that it had been made, his statement in that regard is belied by his counsel who on the hearing of this *coram*

nobis application admitted that the defendant had told him of Anderson's statement.

During his testimony at the trial, in his own behalf, the following transpired:

"The Court: How often did you see Anderson after that?

The Witness: I didn't see him too regular.

The Court: How often?

The Witness: I couldn't say, your Honor.

The Court: Did you ever fight with him after that?

The Witness: No, sir.

The Court: *Any reason you could think of why he should try to accuse you of murder?*

The Witness: *Well, I know he's not loved me.*

The Court: *What?*

The Witness: *He's not in love with me.*

The Court: *I didn't ask you that. Is there any reason why he would falsely accuse you of murder?*

The Witness: *He could be trying to protect someone. I don't know.*

The Court: *But why you?*

The Witness: *I don't know.*

The Court: All right" (emphasis supplied).

It thus appears that when the defendant testified that he knew of no reason why Anderson would falsely accuse him of murder he and his counsel both knew that Anderson had received a promise of help from the prosecution if he would testify against the defendant. Having thus had an opportunity to reveal his information as to the deal Anderson had made with the prosecution and having failed to avail himself of it, is he now—having lost his case—in a position to upset the verdict rendered against him? I think not.

A case close in point of fact to this one is *Green* v. *United States* (256 F. 2d 483, *cert. den.* 358 U.S. 854). There the defendant sought postconviction relief, claiming

that prior to his trial he and his codefendant, Jacobanis, overheard a conversation in the neighboring cell. The conversation was between an Assistant United States Attorney and one Roccaforte, an additional codefendant in the case. The conversation allegedly indicated that the government prosecutor had knowingly persuaded Roccaforte, in exchange for a light sentence and freedom from deportation problems, to testify against the defendant.

In denying the relief sought, the United States Court of Appeals stated (at p. 484):

> "It is clear that this asserted information, of which Green was admittedly aware before he went to trial, cannot now be used as a basis for attacking the judgment of conviction."

In that case Green argued that disclosure of the arrangement of which he was aware would have required him to take the stand as a witness on his own behalf and thus would have required him to waive his privilege against self incrimination. Despite that contention the court held that he could not gamble on a favorable outcome and, when that did not eventuate, seek to supply the withheld evidence on an application to set aside the conviction. Here, that problem does not exist, for the defendant did take the stand and did himself commit perjury when he denied that he had known of the existence of any reason why Anderson should accuse him of murder.

In *Davis* v. *United States* (316 F. Supp. 913, 915), the court stated what I believe should be the applicable rule to be adopted in this State when it said:

> "This Court finds that the use of perjured testimony which is known by the defense to be perjured at the time of trial is not a basis for setting aside a verdict. *Evans* v. *United States*, 408 F. 2d 396 (C.A. 7, 1969), following *Decker* v. *United States*, 378 F. 2d 245 (C.A. 6, 1967)."

In *People* v. *Altruda* (N.Y.L.J., Dec. 2, 1964, p. 19, col. 5), I had occasion to consider the question here posed and I there said (col. 7) that:

> "since he [defendant] was thus possessed of evidence which could have been introduced at the trial he may not now use Stromberg's false innuendoes as a basis for coram nobis relief (*People* v. *Russo*, 284 App. Div. 763, 766; *People* v. *Moore*, 284 App. Div. 925)."

In that case, in analyzing the same cases cited by the defendant here, and set forth above, I pointed out that "in each of the cases the premise for reversal, or the ordering of a hearing, was the perpetration of a fraud upon the defendant because in each case he was ignorant of the falsity of the testimony given by the witness" (col. 7) but that in the case before me the defendant "having chosen not to pursue the matter further than he did, * * * the choice was a voluntary one and he may not in the guise of coram nobis have a second bite of the apple" (cols. 7-8).

In our case no fraud or deception was perpetrated upon the defendant, because he knew at the trial that Anderson's "no prearrangement testimony" was false; and, as the court in another connection said in *United States* v. *Sobell* (142 F. Supp. 515, 519, 528, affd. 244 F. 2d 520, cert. den. *sub nom. Sobell* v. *United States*, 355 U. S. 873):

> "[W]henever knowledge was in the possession of defense counsel during trial of facts which either established the impropriety of certain evidence, or even cast doubts upon its admissibility, they are barred from raising this question on a motion to vacate judgment [p. 519]. * * * *the prosecution cannot suppress evidence or facts if they are known to the defense*" [p. 528; emphasis supplied].

A trial should of course be free of over-reaching on the part of the prosecution and when such conduct has re-

sulted in a conviction it should, without question, be set aside, but the ends of justice are poorly served when a conviction is set aside in a case where the defendant's guilt is clear beyond any reasonable doubt and where the defendant has not been misled or deceived by the perjured testimony and had it in his power to indicate its falsity.

In this case, the court in the *coram nobis* hearing, who was also the Trial Justice, said:

> "I can say now that testimony of this trial sans the testimony of Anderson was in my opinion sufficient to convince the jury of the guilt of this defendant beyond a reasonable doubt, and I was convinced of his guilt beyond a reasonable doubt or I would not have permitted the verdict to stand."

He also said, "When I received papers from Mr. Washington [apparently the instant *coram nobis* application] • • • I was convinced, and I'm convinced of this defendant's guilt of this heinous murder"; but he nevertheless granted the defendant's application to set aside the judgment of conviction, because, in his words, "the appellate courts have, it seems to me, created a very narrow area in which a court may rule in this particular type of situation" and "there is no breadth to the decisions that would permit me to do that [deny the application]. I am still only a Court, and if that's going to be the rule, then it should be made by the Court of Appeals, or by an appellate court, and I can't make it. I would think that this is a type of case that would be justified to have that kind of ruling."

I believe that the learned Justice at the Criminal Term was right in what he believed the rule should be. The proof of the defendant's guilt, in what the Trial Judge himself described as a heinous murder, is undisputed. The facts of the killing were directly testified to by a Mr. and Mrs. Silver, two eyewitnesses, and it seems clear to me that Anderson's testimony played little, if any part, in the

defendant's conviction, for the jury was made fully aware of his prior criminal record, of the pending gun charge and of the fact that he had consumed a large quantity of alcohol on the day of the murder.

Under the circumstances I believe that the record establishes that the prosecution's gross impropriety in withholding the disclosure of the promise made to Anderson was harmless beyond a reasonable doubt (cf. *Chapman* v. *California,* 386 U. S. 18).

To order a new trial for this guilty defendant is to exhalt form above substance and to permit a defendant to benefit by his own perjury. Neither society nor a healthy respect for the law is benefited by such a ruling. The order should be reversed, on the law and the facts, and the application denied.

LATHAM, J., concurs.

MARTUSCELLO, J., concurs in result.

MUNDER, Acting P.J. (dissenting). This is a very disturbing case. The factual basis for the defendant's *coram nobis* application is set forth in the majority opinion of Mr. Justice Shapiro. In his oral decision on the *coram nobis* hearing, Mr. Justice McDonald observed that the trial testimony *sans* the testimony of Anderson was sufficient to establish the defendant's guilt beyond a reasonable doubt. Being in accord with that view, I would prefer to adopt the conclusion reached in the majority opinion.

However, it seems to me that the majority opinion throws an unfair burden on the defense in requiring it to call the lie on the prosecution's witness who falsely denied that he had been promised some benefit for his testimony. Despite the fact that the defendant now says that Anderson informed him before the trial "that the district attorney had told him (Anderson) that he would see what he could do to help him on the gun case under indictment #1821/1966, if he would testify against petitioner," and

the fact that his trial counsel, who continues to represent him here, concedes that his client had informed him of his conversation with Anderson,* the choice presented to them on the trial before the jury was indeed a Hobson's choice. With the extensive cross-examination by both defense counsel and the trial court failing to crack the witness' absolute statement of not only no promise but no suggestion of help at all, the defendant's testimony of his conversation with the witness would receive little or no credence from the jury when the prosecutor remained mute. Defense counsel in these circumstances might well share the jury's lack of belief in the story.

Mr. Justice Shapiro stresses such knowledge by the defendant as obviating any fraud, which he says is the basis for the rule requiring the prosecutor's disclosure of a promise. He concludes that, because the defendant perjured himself when he testified on the trial that he knew of no reason why Anderson testified as he did against him, he should not now be accorded relief. I am not sure that the defendant's testimony was in fact perjurious. In view of Anderson's strong and persistent testimony of no *quid pro quo,* the defendant might well have concluded that Anderson's jailhouse talk with him was simply imaginative boasting. The defendant did not hear the prosecutor make the promise, as was the case in *Green* v. *United States* (256 F. 2d 483), cited in the majority opinion of Mr. Justice Shapiro. Thus the defendant did not *know* the promise had been made and had no way of knowing whether Anderson's trial testimony was true or false.

Anderson's lie about no promise of help was not fixed until the prosecutor who had made the promise, and who tried the case, later deposed in an affidavit in support of his motion to dismiss the gun possession indictment against Anderson that in fact the promise had been made.

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* (although the defendant, in his affidavit in support of his *coram nobis* petition, says he "never told his trial counsel of Anderson's" statement to him.)

Like Mr. Justice McDonald, I would rather ignore this lapse of the prosecutor in failing to reveal the promise as harmless error, particularly since the trial proof overwhelmingly established the defendant's guilt of a heinous murder. But until the Court of Appeals limits the effect of *People* v. *Savvides* (1 N Y 2d 554) I think we are bound to rule that "the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth" and this despite the nature of the case and the strength of the proof (*People* v. *Savvides, supra,* p. 557).

In *People* v. *Adams* (21 N Y 2d 397, 402) Judge Scileppi quoted with approval the language of the court in *People* v. *Lombard* (4 A D 2d 666, 671) that " 'the District Attorney is an advocate, but, at the same time, he is a quasi-judicial official (*People* v. *Fielding,* 158 N. Y. 542) and his primary duty is to see that justice is done and the rights of all—defendants included—are safeguarded. There is a positive obligation on his part to see that a trial is fairly conducted (*Berger* v. *United States,* 295 U. S. 78).' "

Therefore, the order should be affirmed.

Brennan, J., concurs in the dissenting opinion by Munder, J., Acting P.J.

Opinion of May 8, 1972

3. The People of the State of New York, Appellant, v. Leon Washington, Respondent.—On January 24, 1972 this court reversed an order of the Supreme Court, Kings County, entered March 23, 1971, which had granted respondent's *coram nobis* proceeding after a hearing (*People* v. *Washington,* 38 A D 2d 189). The decision and the order entered thereon in this court stated that the reversal was "on the law and the facts". Thereafter the respondent moved for reargument and to amend the order of reversal to state that the reversal was on the law alone. The motion was denied, with a memorandum, on

March 29, 1972. Now, on the court's own motion, its decision denying the respondent's said motion is withdrawn and the order which was made thereon is vacated; and the following is substituted as the decision on said motion, as of March 29, 1972: Motion by respondent (1) for reargument or reconsideration of appeal from a final order of the Supreme Court, Kings County, entered March 23, 1971, which granted defendant's *coram nobis* application to vacate a judgment of the same court, rendered April 17, 1967, convicting him of murder in the first degree upon a jury verdict (this court, by its final order dated January 24, 1972, reversed said order on the law and the facts and denied the *coram nobis* application); and (2) to amend said order of this court so as to state that the reversal was on the law alone. Motion denied insofar as it is for reargument and granted insofar as it is to amend said order of this court. Decision and order of this court, both dated January 24, 1972, amended by striking therefrom the provision that the reversal is on the law and the facts and substituting therefor a provision that the reversal is on the law alone and that the findings of fact of the trial court, if any, are affirmed. When the appeal was decided the majority of the court were of the opinion that an issue of fact was presented by the record by reason of the fact that (1) the defendant claimed in his petition and affidavit in support of his *coram nobis* proceeding that he did not know that it was a fundamental error on the part of the prosecutor to fail to reveal at the trial that he had promised to help a prosecution witness, Anderson, with respect to a gun charge against him and that because of his (defendant's) ignorance as to this he (defendant) did not tell his attorney that Anderson had told him of the prosecutor's promise and (2) the defendant's attorney told the court at the *coram nobis* hearing that he indeed had been told that Anderson had told defendant of the prosecutor's promise. However, at the hearing the defendant did not

testify or otherwise give evidence to support the above-mentioned claims in his papers and we are now of the opinion that his attorney's statement to the court was a definite concession that he had knowledge, at the time of the trial, of the promise in question. We are now of the opinion that our reliance on the statement of defendant's attorney at the hearing was not upon the basis of our making a finding of fact but rather that there was no disputed issue of fact on the subject, so that our determination was on the law alone. Defendant's motion is deemed to be also an application pursuant to CPL 460.20 for a certificate granting leave to appeal to the Court of Appeals from the above-mentioned final order of this court dated January 24, 1972; and as to such relief it is referred to Hon. Fred J. Munder, an Associate Justice of this court. Munder, Acting P. J., Martuscello, Latham, Shapiro and Brennan, JJ., concur. Application by defendant for a certificate granting permission to appeal further to the Court of Appeals pursuant to CPL 460.20 granted by Mr. Justice Munder. A certificate is herewith made granting defendant permission to appeal further to the Court of Appeals and certifying that the case involves a question of law which ought to be reviewed by the Court of Appeals.

APPENDIX D

Decision of the New York Court of Appeals, dated May 12, 1973.

OPINION OF THE COURT OF APPEALS

JONES, J. We affirm in this case on a very narrow ground. At the trial of Washington the appellant here, Martin Anderson an important prosecution witness, falsely and insistently testified on cross-examination that he had no reason to expect leniency in return for his willingness to take the witness stand for the prosecution. In fact at least soft promises, and probably more, had been made to him, and after the trial of Washington a related indictment against Anderson was dismissed on recommendation of the prosecutor, who cited Anderson's cooperation at Washington's trial.

The prosecutor, who personally had given the assurances to Anderson, took no steps to tell the jury the truth of the matter. Were there no more, we would reverse and order a new trial. *People* v. *Savvides,* 1 N Y 2d 554; *People* v. *Mangi,* 10 N Y 2d 86; *Napue* v. *Illinois,* 360 U.S. 264.)

On the present *coram nobis* application, however, Washington repeatedly asserts that just prior to his trial, he had been informed by Anderson of the promises made to Anderson by the prosecution. When at his trial Washington took the stand to establish an alibi, the Trial Judge, on his own, examined him closely as to whether he knew any reason why Anderson would have given the testimony against him which Anderson had. Washington was then evasive and failed totally to disclose to the court or to the jury the knowledge he had of the promises which had been made to Anderson.

Further, at the hearing on this application, Washington's present counsel, who had also been his trial counsel, in-

formed the court that the report of Anderson's pretrial disclosure of the promises made to him was not a recent contrivance. With commendable candor counsel told the court that Washington had told him at the time of the trial of the information furnished by Anderson.

We deplore the failure of the prosecutor immediately to correct the entirely false impression left by Anderson's testimony. Where, however, as here, both the defendant and his counsel, with knowledge of the facts, stood silently by and did nothing themselves to remedy the situation, we would make a very limited exception to the *Savvides* rule. To do otherwise, in our view, would be merely to punish the prosecution, and thus to penalize the People, where there cannot be said to be legitimate interests of the defendant to be protected.

Chief Judge Fuld (dissenting). The critical fact in this case stands undisputed. An important witness for the prosecution blatantly and persistently lied when, on cross-examination, he testified that he had received no promises of leniency in return for his testimony against the defendant, and the trial prosecutor, knowing full well that the witness was lying, stood silently by without telling the court or jury the truth. Such conduct, in my view, is indefensible and demands that the requested writ of *coram nobis* be granted and a new trial ordered. (See, e.g., *People* v. *Savvides,* 1 N Y 2d 554, 556-557; *People* v. *Mangi,* 10 N Y 2d 86, 89; *People* v. *Adams,* 21 N Y 2d 397, 402; *Napue* v. *Illinois,* 360 U.S. 264, 269-270.)

That the witness apparently told the defendant, prior to the trial, that he had been promised leniency and that he had passed such information on to his lawyer can hardly justify or condone the prosecutor's silence. The defendant and his attorney—in view of the witness' repeated and categorical testimony to the contrary in the very presence of the prosecutor—may well have been led to believe that he was lying when he informed the defendant that the Dis-

trict Attorney had promised him leniency. In any event, and this is crucial, defense counsel and his client were assuredly entitled to rest upon the certainty that, if the witness was testifying falsely on so vital a matter, the prosecutor himself would speak out and set the record straight.

In *People* v. *Savvides* (1 N Y 2d 554, *supra*), this court unequivocally announced the principle to be applied in situations such as this (pp. 556-557):

> "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach. The prosecutor should have corrected the trial testimony given by [the witness] and the impression it created. • • • His failure to do so constitutes 'error so fundamental, so substantial,' that a verdict of guilt will not be permitted to stand. (*People* v. *Creasy*, 236 N. Y. 205, 221.)
>
> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. *A lie is a lie, no matter what its subject, and, if it in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.* Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict. The argument overlooks the variant functions to be performed by jury and reviewing tribunal. 'It is for jurors, not judges of an appellate court such as ours, to decide the issue of guilt.' (*People* v. *Mleezko*, 298 N. Y. 153, 163.) • • • That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." (Emphasis supplied.)

What we declared in *Savvides* should not, in this case, be watered down one drop or changed one tittle. When a prosecutor realizes that his witness is perjuring himself—even if he believes that the defendant also knows that the witness has spoken falsely—he should immediately and forthrightly step forward and expose the lie. A regard for the rigid standards of honesty and fair dealing imposed upon prosecutors requires no less. It is upon their " 'conscience and circumspection' " that our criminal justice system depends. (*United States* v. *Dotterweich,* 320 U.S. 277, 285.)

The order appealed from should be reversed and a new trial ordered.

JUDGES BURKE, BREITEL, JASEN, GABRIELLI AND WACHTLER concur with Judge Jones; Chief Judge Fuld dissents and votes to reverse in a separate opinion.

Order affirmed.